IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Criminal No. 01-455-A
ZACARIAS MOUSSAOUI	)	

MOTION FOR GUIDANCE WITH REGARD TO FILING MOTIONS

COMES NOW stand-by counsel who respectfully move this Court for further guidance with regard to filing pre-trial motions. These motions are necessary to the competent preparation of this case by stand-by counsel should stand-by counsel be asked to try this case.[1]

RELEVANT BACKGROUND

Mr. Moussaoui faces an indictment, including capital charges, arising out of the events of September 11, 2001. He has been in custody since August 16, 2001, though facing indictment since December 11, 2001. He is the only individual that has been indicted for the crimes of September 11, 2001 and confronts an ever growing mountain of CDs and video and audio tapes containing the government's evidence in attempting to prepare a defense.

At the January 2, 2002 first arraignment (there have since been two more arraignments on superceding indictments), the Court scheduled dates for the hearing on motions, ordered that the government produce all classified material by Saturday, June 1, 2002, and set September 30, 2002 as the date that jury selection would begin. [C.R. 20]. While there was some discussion about the

[1] "Because death is different, a 'heightened standard of reliability' is required at every step of the process of deciding to impose death in an individual case." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), filing motions is also necessary to assure that any trial in which stand-by counsel are asked to proceed as counsel would meet the requirements of the Fifth, Sixth and Eighth Amendments

amount of time the defense expected it would take to prepare, there was no discussion of the volume of discovery that would be provided. The Court directed the parties to bring discovery disputes to the Court without delay. [*See* Tr. January 2, 2002, p.21] On February 25, 2002, the Court amended the scheduling order to permit the filing of affirmative pretrial motions by June 14, 2002 [C.R. 83] on the representation of the parties that non-classified discovery would not be completed until May 31. (Actually, it was not substantially complete until mid-June and we are still receiving materials.)

On April 22, 2002, Mr. Moussaoui requested that he be permitted to represent himself, and stopped all contact with his counsel of record. On June 13, 2002, the Court granted Mr. Moussaoui's request to proceed *pro se.* The Court granted the government's oral motion to have current counsel remain in the case as stand-by counsel, until such time as qualified counsel was retained by Mr. Moussaoui. Mr. Moussaoui rejected the discovery and suppression motions that counsel filed, and the Court advised that it did not expect to see any more motions from stand-by counsel. (Tr. at 63-65).[2]

On June 14, 2002, the Court entered an order directing that once substitute stand-by counsel are identified, former counsel will be released from all responsibilities in the case. [C.R. 182]. On June 17, 2002, the Court granted Mr. MacMahon's request to be relieved, and appointed Alan Yamamoto in his place. [*See* C.R. 186]. The Court also advised that Charles Freeman,

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[2] On June 13, 2002, the date of the *Faretta* hearing, counsel filed two pre-trial motions, one for discovery, and one to suppress evidence. Mr. Moussaoui has rejected these motions. [Tr. June 25, 2002, pp. 22-23; June 13, 2002, pp. 62-63]. On June 17, 2002, stand-by counsel tendered to the Court six proposed pre-trial motions which would have been filed on behalf of Mr. Moussaoui. [*See* C.R. 188] To date, Mr. Moussaoui has not filed any of the remaining six pre-trial motions that were provided to him by stand-by counsel through the Court. Pursuant to the Court's direction at the April 22 hearing, counsel filed by May 31, 2002 a proposed jury questionnaire.

Mr. Moussaoui's chosen legal advisor, had until June 28, 2002 to enter his appearance as *pro bono* counsel, and that it intended to replace the Federal Defender's office by June 28, 2002.

In the June 17, 2002 order appointing stand-by counsel Yamamoto, the Court directed that "Mr. Yamamoto and his co-counsel must be prepared to try this case if defendant becomes unable to do so." [C.R. 186]. Charles Freeman, Esq. failed to enter an appearance as *pro bono* counsel or comply with the local rules for entry of appearance as stand-by counsel. Neither the Court nor the Federal Defender were successful in finding a medium to large law firm to enter the case as stand-by counsel, and the Court reappointed Mr. MacMahon, and continued the appointment of the Federal Public Defender and Alan Yamamoto as stand-by counsel. [C.R. 311]. Thus, the Court has now appointed three full-time stand-by counsel, which include the FPD office.

It is this role as stand-by counsel and the requirement that we be prepared to step in to try the case that prompts this motion.

STAND-BY COUNSEL WOULD TAKE CERTAIN ACTIONS WERE WE COUNSEL OF RECORD THAT ARE NECESSARY IN ORDER TO BE PREPARED TO TRY THIS CASE

Before the decision to permit Mr. Moussaoui to proceed *pro se*, on June 13, 2002, counsel filed, *inter alia*, a motion for discovery identifying several areas of discovery disputes. This motion was never adopted by Mr. Moussaoui and the Court has not otherwise addressed it. Since that time, stand-by counsel have filed only papers which support or address certain of Mr. Moussaoui's own motions, address purely legal issues with regard to the death penalty, issues related to competency, or as requested by the Court. Stand-by counsel, consistent with its understanding of the Court's

direction and instructions from Mr. Moussaoui[3], have not filed motions that either shape the case or otherwise affect preparation for trial.

Stand-by counsel, were they counsel of record, would immediately bring unresolvable discovery issues to the attention of the Court by way of a motion. Not being counsel of record, and having been advised by the Court not to file motions and directed not to do so by Mr. Moussaoui, stand-by counsel are in the awkward position of not being able to fully prepare for a trial that the Court may expect stand-by counsel to try.

In addition to seeking assistance in resolving the very substantial problems that exist with regard to discovery, stand-by counsel would by now also have moved this Court for a scheduling order for production of the government's witness list, *Jencks* material, *Giglio* material, and the production of Rule 16 (a)(1)(E) information regarding expert witnesses (32 expert resumes were provided this week to stand-by counsel)[4]; move this Court for access to material witnesses in the custody or control of the United States, access the government has represented it will not grant; and file one or more *in limine* motions seeking to limit certain evidence it is anticipated the government will seek to introduce at trial. We would also move to take foreign depositions or depositions to preserve testimony as necessary.

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[3] Mr. Moussaoui, who recently re-engaged communication with stand-by counsel, has directed Mr. Dunham that while counsel are free to join in motions he files, he does not want counsel initiating motions.

[4] The government has designated thirty-one (31) experts so far and, while we do not yet have the information required by Rule 16(E) (hopefully the government is not holding this back because the *pro se* defendant has made no request), we are confident that substantial stipulations could be arrived at eliminating many of these witnesses).

RELIEF REQUESTED

The Supreme Court in *Faretta* made a single reference to the appointment of a "stand-by counsel," noting:

> "Of course, a State may–even over objection by the accused–appoint a 'stand-by counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. [citation omitted].

Faretta, 422 U.S. at 835, n. 46. The role of "stand-by" counsel was further addressed by the Supreme Court in *McKaskle v. Wiggins*, 465 U.S. 168 (1984). Basically, the Court concluded that

(1) the *pro se* defendant is entitled to preserve the actual control over the case he chooses to present to the jury, noting "[t]his is the core of the *Faretta* right." 465 U.S. at 179; and,

(2) "participation by stand-by counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." 465 U.S. at 179.

At this stage in the case, we deal with the participation of stand-by counsel outside the presence of the jury. *McKaskle* concluded that *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury "if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." 465 U.S. at 179.[5]

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[5] We believe our role is not only to be ready to try the case, but to actively assist Mr. Moussaoui in his efforts to do so. Mr. Moussaoui has eschewed most of our efforts that fall into the latter category, although recently there has been some interest expressed in our assistance. The ABA Criminal Justice Defense Function Standards distinguish between defense counsel whose duty is to "actively assist" a *pro se* defendant and defense counsel whose duty it is to assist a *pro se* defendant only as requested, concluding that in the latter instance that counsel "may bring to the attention of the accused matters beneficial to him or her, **but should not actively participate in the**

Undersigned stand-by counsel recognize the Court expects them to be prepared to defend Mr. Moussaoui if he is stripped of, or voluntarily relinquishes, his *pro se* status. However, it is apparent that this case does not lend itself to the "step in" approach to the role of stand-by counsel—it involves massive discovery, complex issues, and the most serious allegations of criminal conduct in modern times. At the center of the case is an individual who has been found competent to represent himself, is now representing himself, and who, in the language of the Court, "does not comprehend significant aspects of federal criminal law . . . and how to file appropriate motions." [C.R.311]. This leads to his failure to file motions which he should file and his requests to stand-by counsel to undertake efforts which may be a waste of time.[6]

Given the foregoing, stand-by counsel request that the Court permit us to file pre-trial motions as necessary to facilitate trial preparation of stand-by counsel.

Respectfully submitted,

STAND-BY COUNSEL

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conduct of the defense unless requested by the accused or insofar as directed to do so by the court." (emphasis added) (*See* Standard 4-3.9, "ABA Standards for Criminal Justice Prosecution Function and Defense Function", Third Ed., pp. 178-179.). Commentary to the Standards advises that in bringing matters to the *pro se* defendant's attention or in otherwise offering assistance, "counsel must not do so in a way that undermines or interferes unduly with the pro se defendant's right to make his or her own litigation decisions." *Id*. at 180.

[6] To the extent we are able to accomplish some of the pretrial needs by joining in Mr. Moussaoui's motions, we will continue to do so.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Guidance with Regard to Filing Motions was served upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 via facsimile and by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 9th day of August, 2002.

/S/
Frank W. Dunham, Jr.